

**Q. v. COMPTROLLER OF INCOME TAX, A
SINGAPORE**[F.C. (Wee Chong Jin C.J., Chua and Kulasekaram JJ.)
February 26, 1969][Singapore—Federal Court Civil Appeal No. Y51 of
1968]

Income Tax — Statutory income — Advocate and solicitor practising in partnership and leaving to join another — Whether he commenced to carry on profession or continued in exercise of his profession — Statutory income of partner — Income Tax Ordinance (Cap. 166), ss. 35 and 36.

The appellant who is an advocate and solicitor practised in partnership. On December 31, 1962 he retired as a partner from one firm and on January 1, 1963 he became a partner in another firm. The Comptroller of Income Tax made an additional assessment against the appellant on the ground that the commencement provisions under section 35(3) of the Income Tax Ordinance applied to him. On appeal to the Board of Review the board held that the appellant had not commenced to carry on or exercise his profession on January 1, 1963 but was continuing in the exercise of his profession as an advocate and solicitor. The comptroller appealed to the High Court and Tan Ah Tah F.J. reversing the decision of the board held that section 35(3) of the Income Tax Ordinance clearly applied to the appellant. On appeal to the Federal Court,

Held, allowing the appeal: section 35(3) of the Income Tax Ordinance was not applicable on the facts of the case as the appellant had continued to exercise his profession though in a new partnership.

In the High Court (District Court Civil Appeal No. 13 of 1966) the comptroller appealed against the decision of the Board of Review and the following judgment was delivered on November 5, 1968 by:

Tan Ah Tah F.J.: The respondent was in 1962 practising as an advocate and solicitor in the firm of Messrs. X. & Co., of which the respondent was a partner.

On the 31st December 1962, the respondent withdrew from the partnership firm of Messrs. X. & Co., and on the 1st January 1963, he became a partner in the firm of Messrs. Y. & Z., also a firm of advocates and solicitors.

On the 28th April 1965, the appellant by a notice of additional assessment assessed the respondent for the year of assessment 1963 to additional tax in the sum of \$3,279.05 on the basis of what may be conveniently referred to as the commencement provisions of section 35(3) of the Income Tax Ordinance (Cap. 166) by reason of the fact that the respondent withdrew from the firm of Messrs. X. & Co., on the 31st December 1962 and became a partner in the firm of Messrs. Y. & Z. on the 1st January 1963.

On the 3rd May 1965, the respondent made an application to the appellant under section 76(2) of the Income Tax Ordinance (Cap. 166) for a review and revision of the said additional assessment.

The appellant refused to amend the additional assessment and a notice of refusal was issued to the respondent. The respondent thereupon appealed to the Income Tax Board of Review and the board allowed the appeal with costs. The decision of the board is set out in the following terms:—

"The board is of the opinion that the taxpayer by withdrawing from the partnership with Messrs. X. & Co., a firm of advocates & solicitors on the 31st day of December 1962 and becoming a partner in Messrs. Y. & Z., another firm of advocates & solicitors, on the 1st day of January 1963 did not commence to carry on or exercise a trade, business, profession, vocation or employment within the meaning of section 35(3) of the Income Tax Ordinance (Cap. 166) but was as such continuing in the exercise of his profession as an advocate & solicitor of the High Court of Singapore.

The appeal is allowed, the assessment annulled and the costs to be taxed and paid by the comptroller to the appellant."

It is against this decision of the board that this appeal has been brought.

The method of computation of the income of a partner from a partnership is set out in section 36 of the Income Tax Ordinance (Cap. 166) which provides:—

"36. — (1) Where a trade, business, profession or vocation is carried on by two or more persons jointly —

(a) the income of any partner from the partnership for any period shall be deemed to be the share to which he was entitled during that period in the income of the partnership, such income being ascertained in accordance with the provisions of this Ordinance, and shall be included in the return of income to be made by such partner under the provisions of this Ordinance;

(b) the statutory income of any partner from the partnership shall be computed in accordance with the provisions of section 35 of this Ordinance by treating his share of the divisible income of the partnership as though it were income of a trade, business, profession or vocation carried on or exercised by him:"

There is a proviso to section 36(1) which is not applicable to the present case.

It is to be observed that the phrase "income of any partner from the partnership" appears in both paragraphs (a) and (b) of section 36(1). It is clear, in my judgement, that in the case of a partner who has a profession, the source of his income is the partnership and not the profession which he happens to be carrying on or exercising by reason of the fact that he is a partner in the firm.

The respondent has referred to section 36(2) which provides for two sets of special circumstances. The first is where a change occurs in a partnership by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the partners continue to be

partners. The second is where a person who has been engaged in any trade, profession or business on his own account continues to be engaged in it after becoming a partner with one or more persons. Section 36(2) provides that in both these sets of special circumstances the statutory income of any person who was engaged in the trade, profession or business both before and after the change shall, notwithstanding the change, be computed in accordance with the provisions of the Ordinance as if no such change had occurred.

It is contended by the respondent that section 36(2) must be strictly construed, and, as its provisions do not expressly deal with the case of a partner leaving one partnership and joining another partnership, it cannot be said that the fact that a partner leaves one partnership and joins another partnership will attract the commencement provisions of the Ordinance. In putting forward this argument, the respondent appears to have given insufficient consideration to the fact that the provisions of paragraph (b) of section 36(1) are applicable to the case envisaged by him. This paragraph (b) provides that the statutory income of any partner from the partnership shall be computed in accordance with the provisions of section 35 of the Ordinance by treating his share of the divisible income of the partnership as though it were income of a trade, business, profession or vocation carried on or exercised by him. The provisions of section 36(2) were never intended to be exhaustive in the manner suggested by the respondent. If a person is not placed in the special circumstances provided for by section 36(2), it is not open to him to argue that those provisions of the Ordinance which are applicable to him should not be so applied simply because his case has not been dealt with by section 36(2). In my judgment, the provisions of section 35(3) of the Income Tax Ordinance (Cap. 166) are clearly applicable to the respondent.

I would therefore allow the appeal. The respondent will pay the appellant's costs of the appeal and of the proceedings before the Board of Review.

The taxpayer appealed against the above judgment to the Federal Court.

FEDERAL COURT.

G.S. Hill for the appellant.

Sat Pal Khattar (State Counsel) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): This is an appeal against the judgment of Tan Ah Tah F.J. allowing an appeal by the Comptroller of Income Tax against

A a decision of the Income Tax Board of Review dated the 14th September, 1966 which in turn allowed an appeal by the appellant against an additional assessment to income tax for the year of assessment 1963.

B The facts are not in dispute. The appellant is and was at all material times an advocate and solicitor, and during the year 1962 practised as such as a partner in the firm of X. & Co. On the 31st December, 1962, the appellant retired as a partner from the firm of X. & Co. and on the 1st January, 1963, became a partner in another firm of advocates and solicitors, Y. & Z.

C The additional assessment which is the subject of this appeal is raised on the basis that section 35(3) of the Income Tax Ordinance, which lays down the method of computation of the statutory income of any partner from, *inter alia*, any profession for the year of assessment in which he commenced to carry on such profession, apply to the appellant, 1963 being the year of commencement.

D When the matter came before the Board of Review it held that the appellant,

E "By withdrawing from his partnership with Messrs. X. & Co., a firm of advocates and solicitors on the 31st day of December 1962 and becoming a partner in Messrs. Y. & Z., another firm of advocates and solicitors, on the 1st day of January 1963 did not commence to carry on or exercise a trade, business, profession, vocation or employment within the meaning of section 35(3) of the Income Tax Ordinance (Cap. 166) but was as such continuing in the exercise of his profession as an advocate and solicitor of the High Court of Singapore."

F The comptroller appealed to the High Court against the decision of the Board of Review and Tan Ah Tah F.J. reversed the decision of the board and held that section 35(3) clearly applied to the appellant.

G We are of the opinion that the decision of the Board of Review is correct and that the provisions of section 35(3) are not applicable on the facts of this case.

H Under the Income Tax Ordinance the basis for determining the statutory income of any person is contained in sections 35 and 36. The general basis is his income for the year preceding the year of assessment and is contained in section 35(1) which provides as follows:—

I "Save as provided in this section, the income of any person for each year of assessment (hereinafter referred to as 'statutory income') shall be the full amount of his income for the year preceding the year of assessment from each source of income possessed by him at any time during the year of assessment, notwithstanding that any such source does not produce income during the year of assessment".

The only other relevant sub-section for present purposes is sub-section (3) the relevant provisions of which are:—

"The statutory income of any person from any trade, business, profession, vocation or employment

for the year of assessment in which he commenced to carry on or exercise such trade, business, profession, vocation or employment and for the two following years of assessment (which years are in this subsection respectively referred to as 'the first year' 'the second year' and 'the third year') shall be ascertained in accordance with the following provisions:—

- (a) for the first year the statutory income shall be the amount of the income for that year;—

It seems to us clear beyond doubt that the basis for computing the statutory income of any person from any trade, business, profession, vocation or employment for each year of assessment must be his income for the preceding year from such trade, business, profession, vocation or employment unless, during the year of assessment, he has as a matter of fact commenced to carry on or exercise such trade, business, profession, vocation or employment. In other words, the basis for computing the statutory income of a person from e.g. a profession, for any year of assessment must be his income for the preceding year from such profession [section 35(1)] unless, during the year of assessment, he has as a matter of fact commenced to exercise such profession [section 35(3)].

It is common ground that on 1st January 1963, i.e. at the beginning of the year of assessment we are concerned with in this appeal, that the appellant continued to exercise the profession of an advocate and solicitor which profession he had exercised throughout the year 1962. It is also common ground that the appellant on the 1st January 1963 commenced to be a partner in a partnership of advocates and solicitors carried on under the style or firm name of Y. & Z. having ceased on the 31st December 1962 to be a partner in a partnership of advocates and solicitors carried on under the style or firm name of X. & Co. It is abundantly clear that the appellant did not commence to exercise his profession in the year of assessment 1963.

The plain fact is that he merely continued to exercise his profession in a new partnership with different professional partners and under a different style or firm name. Notwithstanding these facts, the comptroller contends that section 35(3) applies because he says that if a person chooses to exercise his profession jointly with others i.e. in a partnership, the effect of so doing read with section 36 is that his source of income is not the exercise of his profession but is the partnership itself. Section 36 reads as follows:—

"36. — (1) Where a trade, business, profession or vocation is carried on by two or more persons jointly —

- (a) the income of any partner from the partnership for any period shall be deemed to be the share to which he was entitled during that period in the income of the partnership, such income being ascertained in accordance with the provisions

of this Ordinance, and shall be included in the return of income to be made by such partner under the provisions of this Ordinance:

- (b) the statutory income of any partner from the partnership shall be computed in accordance with the provisions of section 35 of this Ordinance by treating his share of the divisible income of the partnership as though it were income of a trade, business, profession or vocation carried on or exercised by him:

Provided that the provisions of this section shall not be deemed to apply to any trade, business, profession or vocation carried on by a Hindu Joint Family.

(2) If after the commencement of the year preceding the first year of assessment under this Ordinance a change occurs in a partnership of persons carrying on any trade, profession or business, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or business continue to be engaged therein, or a person who until that time was engaged in any trade, profession or business on his own account continues to be engaged in it but as a partner in a partnership, the statutory income of any person who was engaged in the trade, profession or business both before and after that time shall, notwithstanding the change, be computed according to the gains or profits of the trade, profession or business in accordance with the provisions of this Ordinance as if no such change had occurred."

The fallacy in that argument is that a partnership is not taxable *per se* (a partnership not being a person under the Income Tax Ordinance) and nowhere in the Ordinance is there any provision for ascertaining the statutory income of a partnership. There appears to us no necessity for ascertaining the statutory income of a partnership before the income of a partner from a partnership can be brought to tax under the Ordinance.

In our opinion section 36 provides the method by which the statutory income of a person (and not a partnership) who carries on a profession (or trade, business or vocation) in partnership with others is computed. It does this first, by providing the method for arriving at the income of the partnership and by deeming a partner's income to be the share he was entitled to in the income of the partnership and secondly, by treating his share of the divisible income of the partnership as though it were income of a profession (or trade, business or vocation) carried on by him alone. Having regard to the exclusion of a partnership from the definition of "person" in the Ordinance, this provision is clearly necessary, where the profession (or trade, business or vocation) of a person is carried on jointly with others i.e. in a partnership, because in law the whole of the income from the activities of a partnership accrues jointly to all the partners, so that in law a partner would be liable, for tax purposes, on the whole income of the partnership

as though it were his income. Section 36(1) alters this legal result for the purpose of computing the statutory income of such a person.

It is therefore unnecessary to consider the provisions of section 36(2), but, in any event, we are unable to agree with the construction given to it by Tan Ah Tah F.J. He says there are two sets of circumstances provided for by that sub-section, the first being where a change occurs in a partnership in such circumstances that one or more of the partners continue to be partners. The words in that sub-section, however, are "in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or business continue to be engaged therein". Those words clearly relate to a change in a partnership in such circumstances that one or more of the persons who were engaged in the trade, profession or business continue to be engaged "therein" i.e. in the trade, profession or business.

It follows, therefore, even if section 36(2) is relevant, on the facts of the present case, the appellant falls within the first of the two sets of circumstances mentioned in section 36(2). He has on the facts either retired from the partnership carried on under the style or firm name of X. & Co. or, by reason of his ceasing to be a partner, there has been a dissolution of the partnership as to one or more of the partners thereof. A change has accordingly occurred in the partnership of persons, namely in X. & Co., carrying on the profession of advocates and solicitors and this change has occurred in such circumstances that the appellant, who until that time was engaged in the profession of an advocate and solicitor, continues to be engaged in it namely, by practising his profession as a partner in the partnership carried on under the style or firm name of Y. & Z. The position would be the same even if he had continued to be engaged in the profession on his own account after ceasing to be a partner of X. & Co.

For all these reasons the appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Rodyk & Davidson.*

GOMEZ v. GOMEZ

[O.C.J. (Raja Azlan Shah J.) March 6, 1969]

[K.L. — Divorce Petition No. 23 of 1967]

Practice and Procedure — Affidavit — Whether person other than deponent to an affidavit can be cross-examined — Discretion of court — R.S.C. 1957, O. 38 r. 1.

Family Law — Divorce — Custody of child — Application to vary order of custody.

Evidence — Affidavit, by — Cross-examination of person other than deponent to affidavit — Discretion of court.

This was an application to vary the order of custody of a child, which had been made in divorce proceedings. One of the grounds in support of the application was the re-marriage of the respondent to a Hindu. The respondent in answer stated that she continued to practise her religion, Catholicism, and that the child was being educated in the Catholic faith. A letter from a Catholic priest supporting this was annexed to the respondent's affidavit. The applicant applied to cross-examine the priest.

Held: the court had a discretion in the matter and in this case would allow the application, as it is fair and proper that the applicant be allowed to cross-examine the priest.

Cases referred to:—

(1) *Leiserach v. Schalit* [1934] 2 K.B. 353.

(2) *Abrahams & Co. v. Dunlop Pneumatic Tyre Co. & Ors.* [1905] 1 K.B. 46, 52.

(3) *In re SBA Properties Ltd.* [1967] 1 W.L.R. 799.

(4) *In re Holt* (1880-81), 16 Ch. D. 115.

APPLICATION.

R.K. Nathan for the applicant.

M.S. Naidu for the respondent.

Raja Azlan Shah J.: This case raises the singularly important question as to whether a person other than the deponent to an affidavit can be cross-examined. Order 38 rule 1 provides that "a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit." The matter arose in this way.

The respondent who was the former wife of the applicant successfully obtained a divorce from him. Both are Catholics. The respondent was granted custody of their child. The applicant was given access to visit her. The respondent later married one Mr. C. Nadarajah, a Hindu. The applicant applied by way of summons in chambers to vary the order of custody; he now wants to have custody of the said child. One of the grounds in support of that application was the re-marriage of the respondent to a Hindu. Paragraph 13 of his affidavit states.—

"By the petitioner subsequently marrying a Hindu or a non-Catholic she is now outside the Roman Catholic Church and is no more capable of looking into the said child's religious and moral upbringing."

The respondent filed an affidavit in answer, paragraph 7 of which reads as follows:—

"As to paragraph 13 although I am married to a Hindu I continue to practise my religion, Catholicism, without any interference from my husband. I attend Church on Sundays and other religious days with the said child regularly. The said child is now attending Assunta Convent (Primary) School, Petaling Jaya which is a Catholic School. A letter to this effect from